Citation: B.U.K. Investments Ltd. v. Ken Pappas 2002 BCSC 161

Date: 20020131
Docket: C991815
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

B.U.K. INVESTMENTS LTD.

PLAINTIFF

AND:

KEN PAPPAS ALSO KNOWN AS KEN PAPPAN

DEFENDANT

REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE GOEPEL

Counsel for Plaintiff:	D. Scott Lamb
Counsel for Defendant:	Christopher G. Green
Date and Place of Hearing/Trial:	January 24 & 25, 2002 Vancouver, BC

INTRODUCTION

[1] The plaintiff landlord claims for money owing under the terms of a lease agreement. The tenant under the lease was Royce Biomedical Ltd. ("Royce"). The defendant was a director of Royce and guaranteed Royce's financial obligations for the first year of the lease. The defendant denies that a binding lease agreement was concluded.

BACKGROUND

[2] The plaintiff, B.U.K. Investments Ltd., was the owner of the subject premises. It owns and manages several rental properties in the Vancouver area. Its president, Richard Sutcliffe, has more than twenty years experience in property management.

[3] Royce was a public company incorporated in Nevada. Its business was the manufacture and marketing of medical diagnostic test kits. Mr. Pappas, the indemnitor, was a director of Royce. He is also the manager of a local restaurant chain, and is experienced in the leasing of commercial premises.

[4] On September 3, 1998 Royce submitted to the plaintiff an offer to lease certain premises located at 110 - 4320 Viking Way, Richmond, B.C. After some negotiations and changes to the proposal, the offer to lease was accepted on September 14, 1998. The defendant, as indemnitor, agreed to be liable for all obligations of Royce for a period of one year from the commencement of the lease.

[5] The premises contained both office and warehouse space. The lease was for a three-year period commencing November 1, 1998. The offer to lease included the following terms:

> 12. Lease Agreement:
>
> > The Lease shall be in the Landlord's standard form Lease Agreement attached hereto as Schedule "C" which shall be modified to incorporate the terms of this Offer. The Lease, including the terms and conditions set out in this Offer, shall be delivered by the landlord to the Tenant within five (5) business days of acceptance hereof. The Tenant shall have a period of five (5) days from the date of receipt of the Lease to review the terms of the Lease. This Offer is subject to mutual agreement on the Lease conditions within five (5) days of the Tenant receiving the Lease.
> >
> > Following agreement on the terms of the Lease, the Landlord shall deliver execution copies of the Lease to the Tenant and the Tenant shall return it to the Landlord duly executed within five (5) days of its receipt by the Tenant.
> >
> > The Tenant shall not be permitted access or occupancy of the Leased Premises prior to the Lease being returned to the Landlord and executed by all parties thereto.
>
> 20. Binding Agreement:
>
> > The Schedules hereto form part of this Agreement. This Offer and its Schedules and the Landlord's acceptance hereof shall constitute a binding agreement by the parties to enter into the Lease of the Premises and to abide by the terms and conditions herein contained. Such agreement may not be assigned or otherwise transferred by the Tenant without the prior written consent of the Landlord.

21. Indemnitor's Covenant:

In consideration of the Landlord entering into this Lease with the Tenant and for other good and valuable consideration the Indemnitor hereby makes the following Indemnity with and in favour of the Landlord to be limited to a period of one (1) year from the commencement of the Lease.

(a) To make due and punctual payment of all rent, monies and charges expressed to be payable under this Lease;

(b) To effect prompt and complete performance of all and singular terms, covenants, conditions and provisions of this Lease contained on the part of the Tenant to be kept, observed and performed during the period of the term contemplated by this Lease and any renewals thereof;

(c) To indemnify and save harmless the Landlord from any loss, costs or damages arising out of any failure to pay the aforesaid rent, money, and charges and the failure to perform any of the terms, covenants, conditions and provisions of this Lease or any of them;

...

(j) The Indemnitor shall, without limiting the generality of the foregoing, be bound by this indemnity in the same manner as though the Indemnitor was the Tenant named in this Lease.

22. Tenant's Subject:

This Offer to Lease is subject to:

(a) the approval of the Tenant's Board of Directors;

(b) negotiating additional signage apart from clause 17 of this Offer to Lease;

In the event this subject condition is not met or waived by the Tenant prior to September 10, 1998, then the deposit shall be returned in full to the Tenant without penalty or deduction. Upon subject removal, this Offer to Lease shall then become firm and binding on both parties.

23. Landlord's Subject:

> This Offer to lease is subject to the Landlord terminating the existing lease for unit #110 - 4520 Viking Way upon terms which are acceptable to the landlord. In the event this subject condition is not met or waived by the Landlord within five business days of the acceptance of this counter offer, then the deposit shall be returned in full to the Landlord without penalty or deduction. Upon subject removal, this Offer to Lease shall then become firm and binding on both parties.

24. Financial Covenant Subject:

> This Offer to Lease is subject to the Landlord approving the Tenant's financial covenant on or before five (5) business days after the Landlord's receipt of requested financial information, such information to be supplied within one (1) business day of acceptance of this Offer; otherwise this agreement shall be null and void.

[6] Schedule C, being the Landlord's standard form lease agreement included the following term:

> 11.03 If at any time an action is brought for recovery of possession of the Leased Premises, for the recovery of Rental or any other amount due under the provisions of this Lease or because of a breach by act or omission of any other covenant herein contained on the part of the Tenant, and a breach is established, the Tenant shall pay to the Landlord all reasonable expenses incurred therefor on a solicitor-client basis.

[7] By Agreement dated September 22, 1998 Royce waived the subject conditions found in clause 22 of the Offer to Lease. By Agreement dated October 9, 1998 the plaintiff waived the subject conditions contained in clauses 23 and 24 of the Offer to Lease. The October 9, 1998 Agreement contained the following provision:

> The Offer to Lease is now firm and binding upon the Landlord, Tenant and Indemnitor.

[8] Subsequent to October 9, 1998 the plaintiff arranged for the prior tenant in the premises to surrender its lease. In addition, the plaintiff carried out those improvements to the premises that it agreed to do pursuant to the terms of the Offer to Lease.

[9] On October 14, 1998 a letter was forwarded to the home of Mr. Pappas containing copies of the formal lease as contemplated in clause 12 of the Offer to Lease. Mr. Pappas says that this letter was not received.

[10] On October 21, 1998 Mr. Ian Gray, a real estate agent who acted in this matter on behalf of Royce, wrote to Mr. Pappas confirming that the warehouse portion of the premises was ready for occupancy and would be made available immediately after execution of the lease. He asked that Mr. Pappas contact either himself or Mr. Sutcliffe as soon as possible.

[11] Upon receipt of this correspondence, Mr. Pappas did contact Mr. Gray. He advised Mr. Gray he had not received the formal lease agreement and requested that it be sent to his solicitor, Mr. Tomlinson. As requested by Mr. Pappas, the lease was forwarded to Mr. Tomlinson. Mr. Pappas acknowledges that he reviewed the lease with Mr. Tomlinson in late October.

[12] Royce never took possession of the leased premises. Mr. Pappas testified that in early November, after receipt of the lease agreement, Royce's business plan changed and they no longer required the premises.

[13] Royce did not immediately advise either the plaintiff or its agent Mr. Gray that it no longer required the premises. In mid November, Mr. Gray became aware of Royce's change of plans. He advised Mr. Pappas that he had a potential client who might be prepared to take down the space. On November 16, Mr. Pappas, on behalf of Royce, entered an exclusive listing agreement with Mr. Gray's employer CB Commercial Real Estate Group Canada Inc. for that company to act as its agent to sublease the premises.

[14] CB Commercial was unsuccessful in its efforts to sublet the space. In April 1999 the plaintiff commenced this action for monies then owing under the lease. On December 16, 1999 it served notice of default on Royce and on January 6, 2000 issued Notice of Termination and Notice to Quit. The plaintiff ultimately again leased the premises in June 2000.

[15] In this action the plaintiff claims against the indemnitor for those amounts owing by Royce in the first year of the lease. The parties have agreed that amount totals the sum of $84,138.23. The parties are also agreed that if there was a binding lease then Mr. Pappas, as indemnitor, is liable for the amounts claimed.

ISSUES

[1] Was a binding agreement made between the plaintiff and Royce in the absence of the signing of the lease as contemplated in clause 12 of the Offer to Lease?

[2] Is the plaintiff entitled to costs pursuant to article 11.03 of the lease agreement?

DISCUSSION

[16] It is the position of Mr. Pappas that the Offer to Lease did not create a binding obligation between Royce and the plaintiff. The defendant says that pursuant to clause 12 of the Offer to Lease any agreement between the parties was subject to the parties agreeing to the terms of the formal lease.

[17] The question of whether the Offer to Lease formed a binding agreement between the parties is to be determined in accordance with the principle stated by Parker J. in ***Von Hatzfeldt-Wildenburg v. Alexander***, [1912] 1 Ch. 284 at 288, and approved by the Supreme Court of Canada in ***Calvan Consolidated Oil & Gas Co. Ltd. v. Manning***, [1959] S.C.R. 253 at 261 as follows:

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforce-able contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

[18] The issue was also discussed by Robins J.A. in delivering the Ontario Court of Appeal decision in ***Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*** (1991), 79 D.L.R. (4th) 97 (Ont. C.A.), where he said at 103-104,

> As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.
>
> However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding

> or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself.

[19] Clause 12 of the Offer to Lease did contemplate that a formal agreement would be signed by the parties. The terms of that formal agreement were to be as per Schedule C which was attached to the Offer to Lease. The defendant argues that pursuant to clause 12, there had to be a further agreement in relation to the terms of the formal lease.

[20] I do not accept that submission. The terms of the formal lease were set out in Schedule C. The only issue left to be determined was whether or not the conditions of the Offer to Lease were properly incorporated into the formal lease. There is no suggestion in this case that the formal lease that was forwarded to Royce's solicitor failed to accurately incorporate the terms of the Offer to Lease.

[21] Although clause 12 contemplates that the formal lease will be signed by the parties, in my view this is not a case where the parties legal obligations were to be deferred until the contract had been executed. If the tenant breached clause 12 by failing to execute the lease, the remedy for such breach is contained in the Offer to Lease itself, namely, that the tenant is denied access to the premises. Clause 12, in my opinion, is not a condition precedent to the formation of the contract but is merely a term of the contract which contract became binding when the last subject clauses were removed from the Offer to Lease. See: ***British Columbia Egg Marketing Board v. Jansen Industries Ltd.*** (1992), 24 R.P.R. (2d) 36 (B.C.S.C.).

[22] There was a conflict in the evidence as to whether or not Schedule C, which contained the terms of the formal lease, was in fact attached to the Offer to Lease at the time it was prepared on behalf of Royce. Mr. Gray, who prepared the offer on behalf of Royce, says Schedule C was attached to the initial offer and he provided a copy of the document to Mr. Pappas. Mr. Pappas denies that he received the Schedule at that time. I accept the evidence of Mr. Gray.

[23] Even if I was to accept Mr. Pappas's evidence that he did not receive Schedule C prior to the execution of the Offer to Lease, that would not change my conclusion. In the Offer to Lease he has acknowledged that the Schedule is attached to the Offer and that the formal lease itself shall be in those terms. It is not open for him at a later date to deny that the Schedule was in fact attached.

[24] The parties conduct subsequent to October 9 is consistent with their mutual understanding that a binding agreement had come into

force. In this regard we note the plaintiff arranged to have the existing tenant surrender its interest in the demised premises and it undertook the required renov-ations. Mr. Pappas, on behalf of Royce, on November 16, entered into the exclusive listing to sublet the premises. Mr. Pappas is a sophisticated businessman who was experienced in the field of commercial leasing. If Mr. Pappas did not believe that Royce was committed to the subject premises, there was no reason for him to enter into the listing agreement.

[25] The parties' intent can also be gleaned from clause 20 of the Offer to Lease which sets out in clear terms that it was the parties' intention to be bound once the Offer to Lease was accepted.

[26] In the result I find that a binding agreement came into place between Royce and the plaintiff on October 9th, 1998 when the subject clauses were removed. Royce subsequently breached the lease by failing to make the payments required under the lease. Mr. Pappas, as indemnitor, agreed to save harmless the plaintiff from any loss, cost or damages arising out of the failure of Royce to perform the covenants, conditions and provisions of the lease. As previously noted the parties have agreed on damages in the sum of $84,138.23.

[27] In addition to the aforementioned sum, the plaintiff claims interest at the rate set out in the formal lease. Counsel for the defendant agreed that the plaintiff was so entitled. I assume the parties will be able to determine the correct amount and will draft the judgment accordingly.

ENTITLEMENT TO COSTS

[28] The plaintiff also claims costs pursuant to Article 11.03 of the lease. This was not challenged by defendant's counsel. The question of costs, however, raises a difficult issue. Subsequent to the trial my attention was drawn to ***P & T Shopping Centre Holdings Ltd. v. Cineplex Odeon Corp.*** (1995), 3 B.C.L.R. (3d) 309 (C.A.) and ***P.T. Hero Enterprises Inc. v. Paris Restaurant Ltd.***, [1996] B.C.J. No. 2173 (C.A.). The leases in those actions contained similar, albeit not identical, provisions to article 11.03.

[29] In ***P & T Shopping Centre Holdings***, the landlord claimed judgment for a specific amount owing pursuant to a lease as well as for "costs pursuant to the terms of the lease". An alternative claim was advanced for costs pursuant to the ***Rules of Court***. Similar claims are made in this action. The lease entitled the landlord to claim costs as additional rent. The lease described the costs as "the complete legal costs incurred by the landlord as a result of any default by the tenant."

[30] Counsel for the landlord took the position similar to that taken by the plaintiff in this action. Relying solely on the covenant of the lease he contended that the court ought to award special costs.

[31] Southin J.A. distinguished the contractual claim from an order for costs and pointed out that the landlord's remedy was to make demand for payment and then sue for additional rent in the event of non-payment.

Alternatively, she held that the landlord would be entitled to party and party costs if it abandoned its rights under the covenant. Southin J.A. observed at 315:

> If this agreement had said the respondent was entitled to special costs to be taxed, there would be no difficulty in our making such an order. But it does not. It does not embody any term used in the Rules.

The Court of Appeal reached a similar conclusion in ***P.T. Hero Enterprises Inc.***

[32] The plaintiff in this case is, in my view, in the same position as the plaintiff in ***P & T Shopping Centre Holdings***. I am prepared to grant an order of costs on scale 3. Alternatively, if the plaintiff wishes to pursue its contractual remedy, it should make demand on the tenant and indemnitor for the amounts claimed and if not paid bring action. If the plaintiff elects to follow its contractual remedy, it is not entitled, as per the reasoning of Southin J.A. to costs in this proceeding.

[33] In summary, therefore, the plaintiff is entitled to judgment in the sum of $84,138.23 together with interest as calculated under the terms of the lease. If it elects to abandon its contractual claim for costs the plaintiff is also entitled to costs under scale 3. If the plaintiff chooses, however, to pursue its contractual remedy there will be no costs of this proceeding.

"R. Goepel, J."
The Honourable Mr. Justice R. Goepel